In The

Supreme Court of the United States

October Term, 1978

No. 78-505

BRIAN BRAESCH, a minor by DELBERT BRAESCH, his father and next friend;

CHARLES MEYER and CHERYL MEYER, minors, by FLOYD MEYER, their father and next friend;

TAMMY VIE, a minor, by GORDON VIE, her father and next friend;

STUART YOUNG, a minor, by MARY B. YOUNG, his mother and next friend;

Petitioners,

vs.

DANIEL DePASQUALE; WILLIAM H. MINCHOW; ROBERT KREMPKE; ELOISE HIEMKE; the SCHOOL DISTRICT OF ARLINGTON, in the County of Washington, in the State of Nebraska; and THE BOARD OF EDUCATION of the School District of Arlington, in the County of Washington, in the State of Nebraska, said Board consisting of ROBERT PFEIFFER, LAUREN SPANGLER, RUPERT HLIGENKAMP, ALBERT A. SIBBERNSEN, RAY HARMON, LEE NIELSEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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September 23, 1978.

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

—o—

The petitioners—Brian Braesch, Charles Meyer, Tammy Vie, and Stuart Young by their next friends—pray that a writ of certiorari issue to review the judgments of the Supreme Court of Nebraska rendered in these proceedings on May 3, 1978.

—o—

OPINIONS BELOW

The opinion of the Nebraska Supreme Court (reported at 200 Neb. 726, 265 N. W. 2d 842) is set forth in Appendix A, infra. The order of the Nebraska Supreme Court denying the motion for rehearing is set forth in Appendix B. The Decree of the District Court of Nebraska (Appendix C, infra) is unreported.

—o—

JURISDICTION

The judgment of the court below (Appendix A, infra, p. App. 1) was entered on May 3, 1978. A timely motion for rehearing was denied on June 27, 1978 (Appendix B, infra, p. App. 13). The jurisdiction of this court is invoked under the provisions of 28 U. S. C. § 1257(3).

—o—

QUESTIONS PRESENTED

1. Can a minor, by virtue of either an alleged confession of "guilt" or a failure to appear at an administrative hearing held while a Temporary Restraining Order is in effect, be held to have waived his constitutional rights to procedural due process to determine either the "guilt" or the existence of any admission?

2. Can a parent, by virtue of his failure to appear at an administrative hearing on his child's behalf, which hearing was scheduled during the time a Temporary Restraining Order was in effect, be held to have waived child's constitutional right to procedural due process.

3. Are procedural due process requirements violated where the hearing officer appointed for the administrative proceeding, before such proceedings, had already made a determination of "guilt" by consulting only the charging parties, and without any hearing of any kind with the student or their parents had confirmed the expulsion previously made by the charging parties.

—o—

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, § 1

"... nor shall any states deprive any person of life, liberty, or property, without due process of law. ..."

—o—

STATEMENT OF FACTS

This case involves the permanent expulsion without a hearing of students from basketball teams for an alleged violation of team rules.

On Wednesday, January 12, 1977, four boys of the Arlington, Nebraska High School were expelled by the coach from the basketball team.

The next morning at 8:00 A. M. the coach and the principal, without any notice other than to instruct the boys to have their parents at the school at the time set, met with the boys, some of the parents, and a grandparent. The meetings were short and the only discus-

sion was the expulsion. There was no discussion as to what the violation was or who, if anyone, was guilty of it. No questions were asked of the students about the alleged violation and whether any of them or their peers had committed it. At the conclusion of the short meetings, the parents and grandparent were told the decision was final.

On Friday, January 14, 1977, the girls on the girls basketball team were instructed to have their parents meet with the coach and principal. No notice was given as to what the meeting would involve. One parent testified that, at the meeting, she was shown the rules alleged to have been violated. That parent further testified she had never seen the rules prior to that time. During the meeting, neither the nature of the violation nor the ascertainment of the existence of any violation by any student were discussed. The meetings were short as only the penalty was discussed. The parents were told the decision was final and that they would be notified by letter.

The letter was sent by the principal on January 18, 1977 and stated that if the parents wished to appeal to the Board of Education it should be done in writing in five (5) days. On January 19, 1977, at a special meeting of Board of Education two of the parents were told they were out of order when they asked the president to discuss the letter and the expulsion.

Early Friday, January 21, 1977, the parents delivered to the superintendent the request for a hearing, immediate action, and reinstatement. Later that day the superintendent, the principal and the coaches met by themselves and at that meeting the superintendent decided

the expulsion should be enforced and no constitutional rights had been violated. At 6:10 P. M. of the same day after not receiving any response to the letter a Temporary Restraining Order, pending a hearing on Temporary Injunction, was sought and issued by the Washington County District Court (Nebraska).

On January 24, 1977, the principal, during the pendency of the Temporary Restraining Order, sent a letter to the students and their parents stating that an impartial hearing examiner would be appointed and would then make a recommendation to the superintendent who would thereafter make the decision. On the same day, by separate letter and with no reference to the principal's letter, the Board of Education sent a letter and set a hearing for January 27, 1977, the day before the hearing on the Temporary Injunction.

On January 28, 1977, upon hearing, a Temporary Injunction was ordered. On Friday, February 18, 1977, the Permanent Injunction was granted, from which the appeal was taken to the Nebraska Supreme Court.

At the time of the expulsions on January 13, 1977, only six weeks remained in the basketball season and two of those weeks would have passed prior to any hearing being held. Any decision with respect to the fate of the students obviously would have been later.

REASONS FOR GRANTING THE WRIT

The decision below raises important questions concerning the procedural due process requirements of the Fourteenth Amendment.

The consideration of those questions, is complicated by the Nebraska Supreme Court's holding that both the students and their parents had waived the minors' rights to a due process hearing. Waiver was neither pleaded nor discussed in the Trial Court nor was waiver an issue in the appeal, either by brief or by argument, and reference to waiver appeared for the first time in the Nebraska Supreme Court's opinion.

A determination of a minor's constitutional rights by invocation of a doctrine of waiver in and of itself is on the threshold of dangerous law. That danger is even more immediate when the doctrine is applied by an appellate court to questions involving constitutional rights when the issue of waiver has never been pleaded, tried or argued by the parties.

If the Nebraska decision is permitted to lie undisturbed it makes illusory a minor's rights to due process.

This Court recently was presented the opportunity to consider the procedural due process requirements involved in student expulsion from school. *Carey v. Piphus*, 98 S. Ct. 1042 (1978). The present controversy presents the Court with a similar opportunity to consider important procedural due process considerations in the school milieu. The student's right involved herein is the right to participate in extra-curricular school activities. This right has been recognized as being a significant one. *Brenden v. Independent School District*, 477 F. 2d 1292, 1299 (C. A. 8th Cir. 1973). The novel questions raised by this controversy concerns both the ability to waive the procedural safeguards of that right and the nature of the safeguards required.

The Court below held that each of the minors had admitted his or her violation of the rule and that that admission minimized the function of procedural protection to insure a fair and reliable determination on the issue of guilt.

There was no admission by any of the minors at any stage in the proceedings and the only reference to the alleged admissions is the testimony of the charging party at the hearing on the Permanent Injunction five (5) weeks after the expulsion. In this hearing, guilt was not an issue and the minors were not even present to rebut the testimony.

What the Nebraska Supreme Court in effect held was that if a charging party says that a minor had admitted to him a violation of a rule that that testimony is sufficient to find a waiver by the minor of his constitutional rights for a hearing to determine whether the admission was made or the "guilt" existed.

The general rule is that a minor is not capable of waiving his rights to due process or any other rights. 42 Am. Jur. 2d, INFANTS, § 10 (1969); *In re Wretlind*, 225 Minn. 554, 32 N. W. 2d 161 (1948). This Court has not considered whether a minor may waive his rights to procedural due process. This Court, however, has stated that waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the circumstances and likely consequences. *Brady v. United States*, 397 U. S. 742, 90 S. Ct. 1463 (1970). Moreover, this Court has acknowledged that in the civil no less than the criminal area, courts indulge in every reasonable presumption against waiver. *Fuentes v. Shevin*, 407 U. S. 67, 92 S. Ct. 1983 (1972). Thus

the ruling of the court below that the minors waived their right to a hearing under the Fourteenth Amendment runs contrary to the decisions in other jurisdictions and conflicts with the principles of such waiver established by this Court.

The Court below also found that the minors, in not attending the hearing before the Board of Education during the period the Temporary Restraining Order was in effect, waived their rights to due process and judicial protection of their property rights. Under prevailing authority, however, a minor is incapable of waiving his constitutional rights. Thus the question arises as to whether the parent's failure to appear at the hearing on behalf of his child during the pendency of the Temporary Restraining Order constituted a waiver of his child's procedural due process rights. Although this Court has apparently not ruled on this particular issue, the general principles of waiver announced by this Court and stated above are appropriate to the resolution of this issue. Other courts have been reluctant to allow a parent to waive his child's rights. They have generally required that in order for such a waiver to be effective the parents must have fully considered their child's interests. *Bartley v. Kremens,* 402 F. S. 1039 (E. D. Pa., 1975), vacated and remanded on other grounds, 431 U. S. 119. The court below did not consider this requirement in finding the existence of a waiver. This Court has held that a waiver must be voluntary in order for it to be effective. *Brady v. United States, supra.* It is questionable whether these parents could have voluntarily waived their children's constitutional rights since a temporary restraining order was in effect. The purpose of a temporary restraining order is to impose judicial restraint until litigants can be heard on an application for a temporary injunction, *Meeske v. Baumann,* 122 Neb. 786, 241 N. W. 550 (1932); *State v. Associates Discount Corp.,* 161 Neb. 410, 73 N. W. 2d 673 (1955). Thus it would be anamolous to say that in complying with the Temporary Restraining Order the parent's waived their children's constitutional rights to procedural due process.

Aside from the issue of waiver, the court below apparently determined that the rudimentary due process requirements had been fulfilled and a formal hearing had been offered. Although this Court has not had the opportunity to determine what procedural safeguards are required in these circumstances, they have recognized that public school students do have substantive and procedural rights while at school. *Wood v. Strickland,* 420 U. S. 308, 95 S. Ct. 992, reh. den. 421 U. S. 921, 95 S. Ct. 1589 (1975); *Goss v. Lopez,* 419 U. S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975). Moreover, the lower courts have recognized that an important element of an impartial hearing is that the hearing examiner must be disinterested thus, ". . . if the facts demonstrate that a school official's involvement in an incident is such as to preclude his affording the student an impartial hearing, someone other than the principal should be designated to make a decision." *Hawkins v. Coleman,* 376 F. Supp. 1330, 1332 (N. D. Tex. 1974).

The hearing examiner appointed, in the present controversy, was the Superintendent who previously had discussed the case with the expelling coach and then had concluded, without any communication to the students or their parents, that no constitutional rights were involved and the expulsions were to stand. The propriety of such an appointment casts doubt upon the determination of the court below that "rudimentary" due process requirements had been met.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Nebraska Supreme Court.

Respectfully submitted,

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September 23, 1978

APPENDIX A

(No. 706 Single)

CERTIFICATE OF TRANSCRIPT

IN THE DISTRICT COURT OF WASHINGTON COUNTY, NEBRASKA.

State of Nebraska, County of Washington, ss.

I, C. MARK LALLMAN, Clerk of the District Court, within and for the County aforesaid, do hereby certify that the foregoing is a full, true and correct copy of CASE NO. 7881, DOCKET "X", PAGE NO. 280.

BRIAN BRAESCH, et al.,
Plaintiffs,

vs.

DANIEL DePASQUALE, et al.,
Defendants.

SUPREME COURT OPINION

(Filed May 3, 1978)

as the same appears from the records of said Court.

WITNESS my hand and official seal this 22nd day of September, 1978.

SEAL

/s/ C. Mark Lallman
Clerk District Court.

BRAESCH DePASQUALE

NO. 41380 Filed May 3, 1978.

1. The rule that appellate courts will ordinarily dismiss an appeal which has become moot because no actual controversy still exists between the parties is subject to an exception where the issues involved present matters of public interest.

2. With regard to what process is due, where student athletes admit the misconduct with which they are charged, the function of procedural protections in insuring a fair and reliable determination of the issue of "guilt" is not essential.

3. In order to overturn rules for the expulsion of participants from interscholastic athletics on the ground that such rules are unreasonable or arbitrary, or that they invade private rights, the evidence of such facts must be clear and satisfactory.

4. Where a board of education has provided effective, reasonable, and prompt procedures for notice, hearing, and review of an order of expulsion from participation in interscholastic athletics, and the athlete neglects or refuses to follow or comply with such procedures and exhaust such remedies, such neglect or refusal ordinarily constitutes a waiver of any right to subsequent injunctive relief.

Heard before White, C. J., Spencer, Boslaugh, McCown, Brodkey, and White, J. J., and Kuns, Retired District Judge.

McCOWN, J.

The plaintiffs brought this proceeding in the District Court for Washington County, Nebraska, to enjoin the defendant school officials from enforcing any rules of conduct that would prevent full participation by the plaintiffs in the interscholastic basketball program of the Arlington Public Schools. The District Court granted a permanent injunction enjoining defendants from preventing plaintiffs from full participation in the interscholastic basketball teams of Arlington, Nebraska. The defendants have appealed.

The plaintiffs in this action were all minors under the age of 19 and represented by their respective parents. All five plaintiffs were senior members of either the boys or the girls interscholastic basketball teams of Arlington High School. Rules of conduct for boys and girls basketball teams were distributed at the beginning of the 1976-77 basketball season. Participants in the basketball program were required to sign them and obtain one parent's signature on a copy of the rules. The rule involved here was: "DRINKING, SMOKING OR DRUGS: Do not come out for basketball if you plan on using any of the above. Any use of them will result in the immediate expulsion from the squad." Each of the plaintiffs and one or more of their parents had signed the rule.

On Saturday evening, January 8, 1977, a party was held at the home of one of the plaintiffs. The other plaintiffs, along with other seniors who were not members of the interscholastic basketball teams, attended the party. A few days later, Robert Krempke, the coach of the boys basketball team, overheard conversations at school about the party and learned that a senior boy not on the basketball team had been arrested on the evening of the party on a charge

of minor in possession. On January 12, 1977, the coach approached the plaintiff who had been the host for the party and questioned him about the party. The plaintiff host admitted that there had been beer at the party and that he and other members of the basketball team were "involved." After consulting with the school principal, the basketball coach talked with each of the plaintiff members of the boys basketball team. Each admitted being at the party and drinking. The coach told them to leave basketball practice, and told them that he would arrange a meeting with them and their parents, and the principal, the following morning. The following morning, January 13, 1977, Daniel DePasquale, the principal of the high school, and Mr. Krempke, the coach, met with two of the boys involved, and on the next morning with the third. Each boy was accompanied by a parent or adult member of his family. At these brief meetings the coach told the persons present that the rules required expulsion from the basketball team, and the principal supported the coach. The principal testified that at the conclusion of these meetings he considered the boys suspended from the team and told them the decision would be confirmed by mail.

On January 13, 1977, Eloise Hiemke, the girls basketball coach learned about the drinking party from one of the girls involved and from an assistant coach. On the morning of January 14, 1977, the girls coach met with the two girls involved, asked each of them if they had been at the party, and if they had had any alcoholic beverages to drink. Each of the girls admitted she had. The principal and the girls basketball coach met with the girls and their parents on the afternoon of January 14, 1977. The principal and the girls coach advised the girls and their parents that

they felt the girls should be expelled from the team, and that an official letter would be mailed to them advising them of the decision and telling them what could be done to appeal the decision. The principal opinion expressed by the parents at the various meetings was that the penalty was too severe.

By letter dated January 18, 1977, the principal notified all the plaintiffs and their parents that each of the plaintiffs had been suspended from the basketball team until January 31, 1977, and then expelled from the team for the remainder of the season. The letter also informed them that they had 5 days in which to give written notice of their desire to appeal to the board of education, and that at the hearing they would each have the right to present their side of the issue, present any documents or statements, and cross-examine witnesses and be represented by counsel. By letters dated January 20, 1977, each of the plaintiffs requested a hearing.

On January 21, 1977, the plaintiffs filed this action in the District Court for Washington County, and obtained a temporary order resetraining the defendant school officials from enforcing any rules that would prevent full participation by the plaintiffs in the interscholastic basketball program. Hearing on a temporary injunction was set for January 28, 1977.

On January 24, 1977, the plaintiffs were advised by the principal that they were entitled to a hearing before a hearing examiner. The hearing examiner advised the plaintiffs that hearing would be held at 4:30 p.m., on January 26, 1977, at the school. The plaintiffs declined to participate in the appeals procedures established by the school board.

On January 28, 1977, following a hearing, the District Court granted a temporary injunction enjoining the defendants from preventing the plaintiffs from full participation on the interscholastic basketball teams. Trial on the permanent injunction was later set for and held on February 18, 1977. Following the hearing, the court specifically found that the right to participate in interscholastic basketball activities was "a constitutional right protected by the due process clause of the state and federal constitutions" and that plaintiffs had been deprived of that right without due process. The District Court entered a permanent injunction enjoining defendants from preventing plaintiffs' full participation in the interscholastic basketball teams of Arlington High School. The defendants have appealed.

The plaintiffs filed a motion to dismiss the appeal in this court on the ground that the matter is moot. All the plaintiffs have now graduated from high school. It is contended that the judgment in this court will, therefore, have no practical effect as to them, and there is no ground for appellate review. The defendants contend that although the issues may be moot as to the particular plaintiffs here, the case nevertheless involves matters of public interest which affect all schools in the state that maintain programs of interscholastic athletics.

Some cases hold that in a case which has become moot, an appeal will not be retained merely for determining the question of costs. As a general rule, appellate courts do not sit to give opinions on moot questions on abstract propositions, and an appeal will ordinarily be dismissed where no actual controversy exists between parties at the time of the hearing. In State ex rel. Coulter

v. McFarland, 166 Neb. 242, 88 N. W. 2d 892, this court recognized that general rule but said: "This general rule, however, is subject to some exceptions, as where the question involved is a matter of public interest; * * *." The court then held that the questions involved in that case presented matters of public interest because they affected all county courts of the state. The questions involved in the case now before us also present matters of public interest. In the context of disciplinary action in the field of interscholastic athletic competition, almost no case could reach this court for decision before it became moot if we refused to decide all cases where no actual controversy still exists between the parties at the time of appellate hearing and decision. The motion to dismiss is not well taken.

There is some disagreement between the parties as to whether participation in high school athletics is a constitutional right or is a privilege not protected by any constitutional principle. Since Graham v. Richardson, 403 U. S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534, the Supreme Court of the United States has abandoned much of the former dichotomy between rights and privileges in constitutional classifications. The Fourteenth Amendment's protection of property extends to benefits which, under state law or practice, a person has a claim or entitlement. Bd. of Regents v. Roth, 408 U. S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548. The Supreme Court of the United States has also held that temporary suspension from public school infringes upon property or liberty interests protected by the due process clause of the Fourteenth Amendment. Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725.

The State of Nebraska, as a part of its program for public education, has provided athletic opportunities to all public school students. Participation in interscholastic athletics ordinarily has significantly less important constitutional dimensions than does participation in traditional academic education. A student's interest in participation in high school athletics is nevertheless a significant one. Brenden v. Independent School Dist., 477 F. 2d 1292 (8th Cir., 1973). In the light of these constitutional principles, the question is whether the due process clause limits the power of the defendants to exclude the plaintiffs from participation in the interscholastic athletic program of Arlington High School.

Assuming that the application of the rule of conduct involved here implicates a property or liberty interest which is protected by the Fourteenth Amendment, the question becomes one of what process was due the plaintiffs under the circumstances of this case. Due process is not a technical fixed concept to be applied in all conditions, but must be flexible. It calls for such procedural protection as may be appropriate to meet the particular situation. In Goss v. Lopez, *supra*, the Supreme Court held that due process requires that a student facing temporary *academic* suspension for disciplinary reasons be given oral or written notice of the charges against him, and, if he denies them, an explanation of the evidence the authorities have and an opportunity to explain his side of the story. The Supreme Court required those rudimental precautions against unfair or mistaken findings and arbitrary exclusion from school. Certainly no greater requirements should be imposed for expulsion from interscholastic athletics.

There can be no doubt that each of the plaintiffs here had specific advance notice of the rule of conduct involved, and notice of the date, time, and place of the violation charged. Each of the plaintiffs admitted his or her violation of the rule. Courts that have considered the issue have generally concluded that when the acts which are the basis for disciplinary action are admitted, the requirements of due process are far less stringent, and that due process requirements with respect to the "guilt" finding process have been met by the admissions. See, Betts v. Bd. of Educ. of the City of Chicago, 466 F. 2d 629 (7th Cir., 1972); Ector County Independent School Dist. v. Hopkins, 518 S. W. 2d 576 (Tex. Civ. App., 1974). In the latter case the court said: "With regard to what process is due, where students admit the misconduct with which they are charged, the function of procedural protections in insuring a fair and reliable determination of the issue of 'guilt' is not essential."

In the case before us the plaintiffs do not dispute that there was a specific rule of conduct for interscholastic basketball participants; that each of them and their parents had actual notice of the rule in advance; and that each of the plaintiffs violated the rule. The plaintiffs' position is simply that the rule was arbitrary and unreasonable or that the penalty was too great.

Rules prohibiting use of alcoholic liquor or drugs by participants in interscholastic athletics are clearly appropriate. In Richardson v. Braham, 125 Neb. 142, 249 N. W. 557, this court upheld the right of public schools to make reasonable rules for student conduct, and held that in order to overturn such rules on the ground that they

were unreasonable or arbitrary, or that they invade private rights, the evidence of such facts must be clear and satisfactory. This court said: "The wisdom or expediency of a rule adopted by a school board and the motive prompting it are not open to judicial inquiry, where it is within the administrative power of that body." Rules governing the conduct of participants in interscholastic athletics duly and regularly adopted by school authorities ought to be valid and enforceable unless they are clearly arbitrary and unreasonable and serve no legitimate end of educational athletic policy.

The rule involved in this case, even though the penalty of expulsion for the season might be deemed severe by some persons, clearly serves a legitimate rational interest and directly affects the discipline of student athletes. It cannot be said that the prescribed penalty was an arbitrary and unreasonable means to attain the legitimate end of deterrence of the use of alcoholic liquor by student athletes. See, Bunger v. Iowa High School Athletic Assn., 197 N. W. 2d 555 (Iowa); Annotation, 53 A. L. R. 3d 1110 at p. 1124.

Although due process may also contemplate an opportunity to be heard on the question of the penalty to be imposed where the penalty is discretionary rather than prescribed, that opportunity was also provided here. In addition to the informal procedures and meetings, which met all rudimentary requirements of due process, the plaintiffs here were also given the right to appear at a formal hearing with a right to present evidence, cross-examine witnesses, and be represented by counsel. A hearing examiner was appointed and a date set for hearing

but the plaintiffs declined to participate in any of the appeal procedures established by the school board. Instead, they commenced this injunction action 1 day after they had requested the appeals procedure offered by defendants, and the temporary injunction was obtained in the District Court 2 days after the date set for the school hearing which plaintiffs had already refused. Under such circumstances courts should be reluctant to interfere prior to completion of prompt and reasonable procedures for obtaining a final order of the school board. A few days suspension from interscholastic athletic competition can hardly be said to constitute such irreparable harm as to justify judicial interference with orderly and prompt school board procedures.

While school boards are not subject to the Administrative Procedures Act, the rules broadly applying to judicial review of the action of administrative agencies are, or should be, equally applicable here. It is the general rule that administrative action which is not final cannot be attacked in an injunction proceeding, the reason being that in the absence of a final order or decision, power has not been fully and finally exercised and there can usually be no irreparable harm. See 2 Am. Jur. 2d, Administrative Law, § 583, p. 411. On the evidence in this case, a few days delay could not constitute irreparable harm in a constitutional sense or otherwise.

It is clear in this case that the school board had the power to change or reduce the penalty if it were determined to be arbitrary and unreasonable. The plaintiffs refused to exhaust that remedy or to pursue it to the point of finality at which it might be ripe for judicial re-

view. Where a board of education has provided effective, reasonable, and prompt procedures for notice, hearing, and review of an order of expulsion from participation in interscholastic athletics, and the athlete neglects or refuses to follow or comply with such procedures and exhaust such remedies, such neglect or refusal ordinarily constitutes a waiver of any right to subsequent injunctive relief.

The action of the District Court in granting the injunction here was erroneous and is therefore reversed.

REVERSED.

The State of Nebraska, ss.

I, Larry D. Donelson, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have compared the foregoing copy of an opinion filed by said Court on the 3rd day of May 1978, with the original on file in my office and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 3rd day of May 1978.

/s/ Larry D. Donelson, Clerk

By.....Deputy

APPENDIX B

JOURNAL ENTRY

Brian Braesch, a minor, by Delbert Braesch, his father and next friend, et al.,
Appellees,

vs.

Daniel DePasquale, et al.,
Appellants.

Appeal from the District Court for Washington County.

No. 41380.

Finding no probable error in the prior judgment of this court herein, the motion of appellees is overruled and a rehearing herein is denied.

Supreme Court, State of Nebraska, ss.

I, LARRY D. DONELSON, Clerk of the Supreme Court of the State of Nebraska, do certify that I have compared the foregoing copy of Journal entry of June 27, 1978, in the case of Braesch, et al. vs. DePasquale, et al. No. 41380, with the original now on file in my office, and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 20th day of September, 1978.

LARRY D. DONELSON, Clerk
By /s/ John D. Cariotto, Deputy

SEAL

APPENDIX C

IN THE DISTRICT COURT OF
WASHINGTON COUNTY, NEBRASKA

Case No. 7881

Doc. X Page 280

BRIAN BRAESCH, a minor by DELBERT BRAESCH, his father and next friend;

CHARLES MEYER and CHERYL MEYER, minors, by FLOYD MEYER, their father and next friend;

TAMMY VIE, a minor, by GORDON VIE, her father and next friend;

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Plaintiffs,

vs.

DANIEL DePASQUALE; WILLIAM H. MINCHOW: ROBERT KREMPKE; ELOISE HIEMKE: the SCHOOL DISTRICT OF ARLINGTON, in the County of Washington, in the State of Nebraska; and THE BOARD OF EDUCATION of the School District of Arlington, in the County of Washington, in the State of Nebraska, said Board consisting of ROBERT PFEIFFER, LAUREN SPANGLER, RUPERT HLIGENKEMP, ALBERT A. SIBBERNSEN, RAY HARMON, LEE NIELSEN:

Defendants.

DECREE

(Filed February 18, 1977)

February 18, 1977, plaintiffs appeared by their attorneys Malcolm D. Young and Clayton H. Shrout and defendants appeared by their attorneys Neil W. Schilke and James K. Langdon and Verne Moore, Jr. appeared as Amicus Curiae for trial before the Court and the Court being duly advised in the premises finds:

1. The Court finds generally in favor of the defendants and against the plaintiffs on their first cause of action and that such cause of action should be dismissed, the Court finding specifically that the action taken by the defendants with respect to the plaintiffs does not violate the provisions of L.B. 503 passed by the Nebraska Legislature effective July 10, 1976 which is now Sections 79-4,170 to 79-4,205 R. S. Supp. 1976 of Nebraska.

2. The Court finds generally in favor of the plaintiffs and against the defendants on their second cause of action and that a permanent injunction should be granted enjoining defendants and each of them from preventing plaintiffs and each of them from full participation in the interscholastic basketball teams of the defendant School District of Arlington, Nebraska and the requiring the administrators of such district to remove all references to suspensions or expulsions relating to such participation from the plaintiffs' records, the Court finding specifically:

a. The right of the plaintiffs to participate in the extra-curricular basketball activity of the defendant district is a constitutional right protected by the due process clause of the state and federal constitutions.

b. Plaintiffs were not afforded such due process.

c. Plaintiffs should recover from defendants their costs herein expended in the sum of $89.50.

IT IS SO ORDERED.

DATED February 18, 1977.

BY THE COURT:

/s/ Walter G. Huber
Judge

Copies to:

Clayton H. Shrout, Esq.
Malcolm D. Young, Esq.
Verne Moore, Jr., Esq.
Neil W. Schilke, Esq.
James K. Langdon, Esq.